

Federal Court



Cour fédérale

Date: 20160407

Dockets: IMM-2916-15

Citation: 2016 FC 380

Ottawa, Ontario, April 7, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SAIDA AIDA IBRAHIM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board upholding a decision of the Refugee Protection Division [RPD], which denied her refugee claim. The RAD upheld the RPD's decision solely on the basis of its finding on the issue of the applicant's credibility. In particular, the RAD held that the applicant was not credible when she claimed that she would face persecution in Kenya because of an arranged marriage and because of her conversion to Christianity.

Background

[2] On September 5, 2008, the applicant arrived in Canada to commence studies at the College of New Caledonia in British Columbia. She graduated in April 2012, and then she remained in Canada on a work permit.

[3] In February 2014, the applicant says that she learned that her father had made arrangements for her to marry a man in Kenya. The applicant informed her father that she was not practicing Islam and was thinking of converting to Christianity. The applicant's father told her that she was a disgrace to her family and community.

[4] The applicant claims that she fears returning to Kenya because of the arranged marriage and, in particular, the risk that the marriage could turn violent, because it is "based on power." She also says that she fears persecution on account of her Christian faith.

[5] In May 2014, the applicant claims that she converted to Christianity and further claims that she was baptized on December 24, 2014. On November 26, 2014, the applicant made a *sur place* refugee claim in Canada.

[6] On February 10, 2015, the applicant's refugee claim was rejected by the RPD. In an oral decision, the RPD held that the applicant was not credible when she claimed that she had converted to Christianity, that she was being pressured into an arranged marriage, and that she feared persecution by her father, relatives, and community. The RPD also held that the applicant's delay in making a refugee claim undermined her alleged subjective fear of

persecution: even though she learned about the proposed arranged marriage in February 2014, she did not make a refugee claim until November of that year. Finally, the RPD held that the applicant had not provided convincing documentary evidence to corroborate her fear of persecution. In the alternative, the RPD held that the applicant had an IFA in Nairobi.

[7] The applicant appealed the RPD decision to the RAD on a number of bases. The first ground of appeal raised in her memorandum filed with the RAD was the credibility finding of the RPD; namely, that “the panel rejected the claims of the appellant on the basis, among others, that the appellant was not a credible witness.” The RAD, which ultimately agreed with the RPD’s finding, conducted the appeal only with respect to that issue.

[8] On appeal, the applicant submitted no new evidence but rested her appeal on the record before the RPD.

[9] On appeal, the RAD agreed with the applicant that three of the reasons the RPD gave for its credibility determination could not support that finding. First, the RAD drew no negative inference as a result of the lack of documentary evidence regarding the prospective groom or wedding plans. Second, it drew no negative inference as a result of the applicant’s testimony that she could choose not to marry. Third, it drew no negative inference from the applicant’s testimony that her father had never abused her and that her mother supported her choice not to marry.

[10] The RAD did agree with the RPD's overall credibility finding based on the following evidence.

[11] First, it found that the applicant's testimony appeared at times to be rehearsed and at other times unconvincing and vague. In particular, it found her explanation of why she converted to Christianity to be unconvincing and vague.

[12] Second, the RAD assigned little weight to a letter from Reverend David Elliot, dated July 3, 2014, which was written on the letterhead of Knollwood Baptist Church in London, Ontario. It held that the letter appears to be a form letter sent to new attendees at the church and it noted that the letter provided neither evidence that the applicant was attending church on a regular basis nor evidence of her conversion to Christianity.

[13] Third, the RAD assigned no weight to two Knollwood Baptist Church weekly service programs she entered as evidence at the RPD because they provided no evidence of the applicant's conversion to Christianity.

[14] Fourth, the RAD assigned little weight to a study package entitled "Believer's Baptism." It noted that the study package had not been completed, but acknowledged that it was signed and dated by the applicant on December 24, 2014, and was accompanied by a handwritten note reading "6:15-bathing suit, towel, 6:30pm-service." The RAD gave these documents little weight because the applicant had failed to provide a program for the baptism, despite providing

programs for other, less important, church services, and because she had failed to provide a baptismal certificate.

[15] Fifth, the RAD assigned little weight to a letter from Muriel Goodridge, dated January 17, 2015, which stated that Ms. Goodridge has known the applicant since November, 2014, when the applicant became a member of Knollwood Baptist Church. Ms. Goodridge says that the applicant was baptised on December 24, 2014. The RAD gave this letter little weight because it was not affirmed and identification of the letter's author was not provided. The RAD also notes that the applicant "provided no persuasive evidence that she was baptized" and "[t]he letter from Ms. Goodridge can only attest to the Appellant's participation in church activities in Canada; the letter does not attest to the motivations of the Appellant."

[16] Sixth, the RAD assigned little weight to a letter from the applicant's sister, which states, among other things, that the applicant's father is planning on marrying her off to an old Muslim man. The RAD assigned this letter little weight because it is not affirmed, the letter writer's identity is not provided and the applicant is not identified in the letter. The RAD also expresses the following concerns about the format of the letter:

[T]he salutation of the letter is "Dearest siz". However, "Dearest" is written on one line and the word "siz" is written on the line below, indented, and in a different ink. The RAD also notes that the signature of the author is "Your loving sis", [unreadable signature]. The RAD finds it unreasonable that the author of the letter referred to her sister as "siz" and then later as "sis".

The RAD found implausible the applicant's explanation for why this letter was sent, given that the applicant frequently communicates with her sister on Facebook. The applicant claimed that

her sister communicated by letter, as opposed to Facebook, because she was concerned that someone might hack into her Facebook account. This explanation is supported by the letter itself, which states that “[t]his is the story I was to tell you on facebook but just felt I should write you instead because of security reasons.” The RAD did not find this explanation plausible because, although there was evidence that the Kenyan government monitors websites, there was no evidence that it would be interested in the applicant’s arranged marriage.

[17] Seventh, the RAD assigned little weight to a letter from the applicant’s mother. The letter states, in part, that the applicant’s father “is still insisting on marrying you off to an old man” and that, although the applicant’s mother supports the applicant’s decision not to marry, there is nothing she can do. The RAD assigns this letter little weight because it is not dated or affirmed, no identity document was provided for the author of the letter, and the applicant is not identified in the letter. The RAD also observes that:

The signature of the author is “mum”. While not a handwriting expert, the RAD observes that the printing of the word “mum” is considerably different than the printing in the body of the letter. The salutation reads “Dearest Daughter”. The words “Daughter”, in the salutation, and “mum”, in the signature, appear to be in different ink than the remainder of the letter.

[18] Eighth, the RAD held that the applicant’s delay in making a refugee claim undermined her claim of subjective fear. The applicant’s father told her about the arranged marriage in February 2014 and she converted to Christianity in May 2014. Nevertheless, she failed to make a refugee claim until November 26, 2014. The RAD did not accept the applicant’s explanations that her work visa was still valid when she made her claim and, in any case, she was not aware of her right to make a claim until shortly before she made it. The RAD held that, as an educated

woman who is fluent in English, the applicant could have made inquiries about the refugee process. The RAD further held that the applicant's dilatory behaviour was not that of someone who fears for her life.

[19] Ninth, the RAD found it suspicious that the applicant converted to Christianity shortly after learning that her father intended to marry her off to an older Muslim man, and that all of this occurred while the applicant was a temporary resident of Canada. It held that this coincidence diminished the applicant's credibility.

Issues

[20] The applicant raises two issues: (1) Whether the RAD breached the applicant's right to procedural fairness, and (2) whether the RAD's assessment of the evidence leading to the credibility finding was reasonable.

Analysis

A. Procedural Fairness

[21] The applicant submits that the ninth basis (above at paragraph 19) on which the RAD relied for upholding the credibility finding was a new issue and the RAD owed her a duty to confront her with its concerns but failed to do so.

[22] When addressing this aspect of the evidence, the RAD makes it clear in its decision that the finding of coincidence was not a finding made by the RPD, nor was it raised by the applicant in her appeal:

Although not mentioned in the appeal pleadings or in the RPD member's decision, the RAD notes that during the oral hearing the Appellant was asked to comment on the coincidence of the timing of the events that led to her claim for refugee protection.

[23] As the respondent notes, and the RAD confirms, the RPD did ask questions of the applicant relating to the alleged coincidence; however, it made no express finding on the evidence.

[24] The applicant submits that she was entitled to know that this would be relied upon by the RAD in order to address its concerns. She relies on the decision of Justice Kane in *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 [*Ching*], and in particular the statement at paragraph 71:

If the RAD pursues a new issue, it seems clear that procedural fairness requires that the party or parties affected be given notice and an opportunity to make submissions.

[25] Reference was also made to Justice Hughes' statement in *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 [*Husian*] at para 10:

The point is that if the RAD chooses to take a foray and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions.

[26] I find that both of these authorities are distinguishable from the facts here. In both of these cases, the RAD went beyond the issues that were before it; whereas in this case, it did not. Here the issue did not change nor did the RAD explore a new issue; rather, the RAD's

assessment of the evidence going to the issue the applicant raised, differed from the RPD's assessment.

[27] In *Ching* the RPD found the applicant to be generally credible. That credibility finding was not an issue on appeal to the RAD. Nevertheless, the RAD, on its own motion, raised the issue of the applicant's credibility. Justice Kane, quite correctly, found that this was a breach of procedural fairness because this was a "new" issue and the applicant would have had no reason to think that it would be considered by the RAD in the appeal.

[28] The facts in *Husian* are similar. The RPD found that the applicant had failed to establish his identity. He had no documents and it was found that neither he nor his great aunt were credible witnesses. It appears from the very brief reasons that the RAD, based on its own review of the record, went on to conclude incorrectly that there was no evidence of the applicant being a member of the Dhawarawayne clan. Moreover, it also commented on differences in the spelling of the applicant's name in various documents and "[t]here were other errors." Justice Hughes describes these as "further substantive findings."

[29] In the case at bar, a central finding of the RPD that was the subject of the appeal to the RAD was its finding that the applicant's evidence regarding her conversion to Christianity, her arranged marriage, and her fear, was not credible. The RAD took exception to some of the findings relied upon by the RPD for the conclusion that she was not credible, accepted others, and, in one instance, relied on an exchange between the RPD Member and the applicant at the hearing regarding the timing of events, and found that they were too fortuitous to be believed.

[30] Unlike *Ching* and *Husian*, the RAD was not raising a new issue; rather, it was addressing the very issue raised by the applicant – the finding that she was not credible in regards to her conversion, her arranged marriage, and her fear. It too found she was not credible. It was entitled, and indeed obliged to review and assess the evidence afresh. It did so. The fact that it saw some of the evidence differently is not a basis to challenge the decision on fairness grounds when no new issue was raised.

B. *Reasonableness of Decision*

[31] I agree with the applicant that the RAD drew negative inferences from the failure of evidence to include some feature or information that it could not reasonably be expected to include: *Osman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 921 at paras 37-39; *Taha v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1675 at para 9).

Nonetheless, that evidence was of little if any persuasive value. For example, the discounting of the letter from Ms. Goodridge on the basis that “the letter does not attest to the motivations of the Appellant” is unreasonable as Ms. Goodridge cannot be expected to speak to the applicant’s motivations for going to church. Additionally, the discounting of the letters from the applicant’s mother and sister on the basis that they were not affirmed is unreasonable as there is no evidence that they were prepared for the purpose of litigation. In particular, the letter from the applicant’s sister is dated June 3, 2014, and therefore predates by several months the applicant’s refugee claim.

[32] On the other hand, the RAD’s observations regarding the use of different coloured ink, and other anomalies in the letters from the family, was reasonable and greatly diminishes the

evidentiary value of these letters. I do not accept that the RAD engaged in a microscopic examination of the applicant's evidence for inconsistencies.

[33] The RAD's discounting of the letter from Ms. Goodridge because the letter's author is not identified is unreasonable and appears to be inaccurate. The letter's author is identified: it is Muriel Goodridge. Her signature is on the letter and she is identified as a member of Knollwood Baptist Church in London, Ontario. Nonetheless, I agree with the RAD that the letter is of little value in establishing either that the applicant is a member of the church or that she converted to Christianity. More persuasive evidence, such as a baptismal certificate or a church program listing that ceremony were reasonably expected to be available and would no doubt have gone a long way to corroborating the applicant's testimony.

[34] The applicant also challenged the RAD's finding that her delay in claiming also diminished her credibility relating to her fear. I am unconvinced. Here there was a substantial delay, and the fact that the applicant still had a right to work in Canada did not grant her status to remain in Canada after it expired. Accordingly, it was not unreasonable to expect a person who feared to return to her country of origin to take active and timely steps to regularize her status in Canada so that she would not have to return home.

[35] Although imperfect, I am not convinced that the RAD's assessment of the evidence was unreasonable. This application must be dismissed.

Question for Certification

[36] The applicant proposed the following question for certification: “Where the RAD raises credibility issues not raised previously must the RAD convoke a hearing to give the applicant a right to respond?”

[37] I agree with the respondent that the proposed question would not be dispositive of an appeal because, as I have found, the RAD did not raise a credibility issue not previously raised – as it did in *Ching*. Rather, the credibility issue was squarely before it and it examined all of the evidence when determining whether the credibility finding was made out. In so doing, it relied on evidence not relied on by the RPD, but that is the risk one takes when one launches an appeal. If an appeal tribunal were bound by the evidentiary findings made by the original decision-maker, the appeal would be largely *pro forma*.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2916-15

STYLE OF CAUSE: SAIDA AIDA IBRAHIM v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 24, 2015

JUDGMENT AND REASONS: ZINN J.

DATED: APRIL 7, 2016

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